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NDM, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BONNIE REGINA,

Plaintiff,

v.

QUEST DIAGNOSTICS, INC., NDM,
LLC; and DOES 1-25, Inclusive,

Defendants.

Case No. C07-03881JCS

**CROSS-CLAIMANT NDM, LLC's NOTICE
OF MOTION AND MOTION FOR
ADMINISTRATIVE RELIEF FROM
GENERAL ORDER 56 IN ORDER TO
FILE A MOTION FOR SUMMARY
JUDGMENT AGAINST CROSS-
DEFENDANT QUEST DIAGNOSTICS,
INC.**

[Civ. LR 7-11; Gen. Order 56(8)]

Date: Submitted for Immediate Determination
without Hearing [Civ. LR 7-11(c).]

Judge: Magistrate Judge Joseph C. Spero

QUEST DIAGNOSTICS, INC.,

Cross-Claimant,

v.

NDM, LLC and DOES 1-25, Inclusive,

Cross-Defendant.

I.

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE on the date set forth above the court will rule on the Motion of NDM, LLC's Motion for Administrative Relief from General Order 56 in Order to File a Motion for Summary Judgment against Cross-Defendant Quest Diagnostics, Inc.

This Motion is made pursuant to Civil Local Rule 7-11 and General Order 56. This Motion will be and is made and based on this Notice of Motion, Motion, Memorandum of Points and Authorities in Support thereof, the Declaration of Jack C. Provine, and on such other matters as the Court may consider at the time of ruling on the Motion.

II.

RELIEF SOUGHT

By this motion, Cross-Claimant NDM, LLC ("NDM") seeks relief from General Order 56, paragraph 2, which states (in part) "[a]ll other discovery and proceedings are STAYED unless the assigned judge orders otherwise." Specifically, NDM seeks an order from the Court granting administrative relief to permit the filing of a Motion for Summary Judgment against Cross-Defendant Quest Diagnostics, Inc. ("Quest").

III. POINTS AND AUTHORITIES

Good cause exists to grant the administrative relief requested. This is an Americans with Disabilities and California access case filed against the lessee and lessor of the subject real property. One key issue is liability as between Quest, the lessee, and NDM, the lessor, under a written lease agreement which provides clear guidance on this issue. Accordingly, a summary judgment ruling on the issue of liability between Quest and NDM under the written lease would promote more productive settlement discussions, and help to facilitate a full and final resolution of this case.

The Summary Judgment motion is directed towards the indemnity and contract rights vis-

à-vis the co-defendants and cross-defendants, NDM and Quest. The motion is not directed toward the defendants' possible joint and/or several liability to the Plaintiff. The bases of the Motion for Summary Judgment are threefold: First, the lease obligated Quest¹ to (a) to comply with all laws related to its particular use in the operation of its facility; (b) make repairs and alterations; and (c) indemnify NDM. By failing to do any of the foregoing, Quest breached the lease. Next, the written lease contains an express contractual indemnity provision, whereby Quest agreed to broadly indemnify NDM for all claims, no matter how caused.

III. ARGUMENT

A. ADMINISTRATIVE RELIEF WILL PROMOTE A JUST, SPEEDY, AND INEXPENSIVE DETERMINATION OF THIS ISSUE OF LIABILITY.

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex v. Catrett* (1986) 477 US 317, 106 S.Ct. 2548, 2555.

B. RESOLUTION OF THIS LIABILITY ISSUE BY SUMMARY JUDGMENT WILL HELP FACILITATE SETTLEMENT OF THE CASE

Summary Judgment is appropriate in cases where the remaining unresolved disputes are primarily legal, rather than factual in nature. See *Koehn v. Indian Hills Cmty. Coll.*, 371 F.3d 394, 396 (8th Cir.2004). The court may enter a summary ruling on the issue of liability alone, even though a genuine issue of material fact exists as to damages. Rule 56(d)(2). Resolution of the liability issue before trial is perhaps the most common example of the "partial summary judgment" procedure. See *Pacific Fruit Express Co. v. Akron, Canton, & Youngstown Railroad Co.* (9th Cir. 1975) 524 F2d 1025.

Here, resolution of liability as between NDM and Quest is necessary in order for the parties to meaningfully participate in settlement discussions. The parties have already agreed to execute a Consent Decree in order to resolve injunctive relief issues. (Provine Decl. para. 6). The

¹¹ Unilab was the initial lessor but Quest assumed the lease from Unilab. For convenience Quest and Unilab are referred to simply as Quest.

1 only remaining issues to resolve are monetary issues among all of the parties. (Provine Decl.,
 2 para. 6). In order to resolve monetary issues between NDM and Quest without further litigation,
 3 NDM and Quest would benefit from a judicial determination as to liability. (See Provine Decl.,
 4 para. 6).

5
 6 **IV.**
CONCLUSION

7 Good cause exists to grant administrative relief from General Order 56's stay on all
 8 proceedings in order to permit NDM to file a Motion for Summary Judgment.

9 By the Summary Judgment motion, NDM will establish all essential elements of Quest's
 10 breach of at least three material provisions of the lease. Accordingly, there is no genuine issue
 11 of material fact that Quest has violated the terms of the lease by its operation of a medical
 12 collection facility without performing the alterations and repairs necessary to operate lawfully as
 13 a public accommodation. Essentially, Quest has caused an action in abatement to be filed. The
 14 express terms of the lease define this as a breach of lease, at lessor's option. Moreover, Quest
 15 breached its covenant to maintain and repair the premises in a safe condition, and Quest breached
 16 its covenant to indemnify NDM. Although the extent of NDM's damages are not yet known, the
 17 fact of liability and damages is. In addition, Quest has agreed by contract to hold NDM harmless
 18 from any claims for damages no matter how caused. The meaning of that clause is unambiguous
 19 under the lease. All that remains to be adjudicated is the extent of damages.

20 Resolving these key liability issues as between the two defendants (and cross-defendants)
 21 now will advance the case and possible final resolution since the defendants' respective potential
 22 responsibilities will be determined.

23 Dated: June 11, 2008

SHAPIRO BUCHMAN PROVINE & PATTON LLP

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 25 /s/ Jack C. Provine
 26 Jack C. Provine,
 Attorneys for Defendant NDM, LLC